IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

APOLLO CIVIC THEATRE, INC.
Appellant,

v.

Docket No. 33889
From the Circuit Court of
Berkeley County, West Virginia
Civil Action No. 06-C-528

STATE TAX COMMISSIONER
OF WEST VIRGINIA,
Appellee.

APPELLANT'S BRIEF

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I. RULING FROM WHICH APPEAL IS TAKEN

This appeal is taken from the Final Order of the Circuit Court of Berkeley County, dated August 7, 2007 (hereinafter, the "Final Order"), denying Appellant's Petition for Appeal of an administrative decision (hereinafter, the " Administrative Decision") issued by the West Virginia Office of Tax Appeals ("OTA") against the Appellant, the Apollo Civic Theatre, Inc., a non-profit corporation (the "Appellant") and in favor of the State Tax Commissioner of West Virginia (the "Appellee"). The Circuit Court's Final Order affirmed the Appellee's assessments against the Appellant for use tax and for consumers sales and service tax, together with statutory interest on both assessments.

II. STATEMENT OF THE CASE

This appeal arises from the denial of the Appellant's Petition for Appeal from the Administrative Decision issued by OTA. At issue is whether the Circuit Court erred as a matter of law in denying Appellant's Petition for Appeal. In contending that the Circuit Court so erred, the

Appellant asserts that the Circuit Court's Final Order was clearly erroneous and was based on incorrect legal standards: (1) in effectively reviewing the legal conclusions, on which the Administrative Decision was based, under a clearly erroneous and abuse of discretion standard instead of the *de novo* standard; (2) in concluding that the Appellant had not carried its burden to show that the legal conclusions in the Administrative Decision were erroneous; (3) in concluding that the Legislature's intent in using the statutory terms "health and fitness" was ambiguous; (4) in concluding that the OTA was not bound by the parties' joint stipulation that the Appellant provided recreational opportunities to the public; (5) in concluding that the term "support" in the governing statute did not include the value of donated services; and (6) in concluding that the Appellee's use of certain accounting rules to limit the applicability of the governing statute was entitled to conclusive deference.

III. RELEVANT PROCEDURAL HISTORY

On April 9, 2004, following an audit, the Appellee issued an assessment of consumers' sales and service tax (the Sales Tax Assessment) against the Appellant. The Sales Tax Assessment was based on the Appellee's determination that the Appellant had failed to charge, collect and remit tax on its sales of tickets for admission to the live dramatic performances it presented during the period January 1, 2001 through December 31, 2003. The Sales Tax Assessment consisted of tax of $11,778.00 and interest of $1,511.00, for a total liability of $13,289.00.

Also, on April 9, 2004, an assessment of use tax was issued by the Appellee against the Appellant based on the Appellee's determination that the Appellant did not pay applicable taxes on its purchases for use in the conduct of its operations (the Use Tax Assessment). The Use Tax Assessment covered the Appellant's purchases during the period January 1, 1999 through December

31, 2003, and was for tax of $4,039.00 and interest of $1,003.00 for a total assessed liability of $5,042.00.

On June 5, 2004, the Appellant filed timely petitions for reassessment with the West Virginia Office of Tax Appeals (OTA) challenging both the Sales Tax Assessment and the Use Tax Assessment (collectively, the Assessments). Subsequent to a brief, preliminary hearing held by OTA on April 26, 2005, via videoconferencing facilities in Charleston and Martinsburg, wherein the Appellant was not represented by counsel, and following the appearance of the undersigned counsel for the Appellant, the parties agreed to submit the matters for decision on stipulated facts and briefs.

On June 1, 2006, after the parties had filed jointly stipulated facts and their respective briefs, OTA rendered the Administrative Decision in the matter of the Appellant's petitions for reassessment in which both the Sales Tax Assessment and the Use Tax Assessment were affirmed (the OTA Decision).

On or about July 26, 2006, the Appellant timely filed its Petition for Appeal before the Circuit Court. Thereafter, the Circuit Court received and considered the parties' respective memoranda of law and proposed orders, and heard the oral arguments of their respective counsel.

In its Final Order dated August 7, 2007, the Circuit Court affirmed the OTA Decision upholding the Appellee's Assessments against the Appellant. The Appellant now herein respectfully asks this Court to grant its overrule and to reverse the Circuit Court's Final Order.

IV. STANDARD OF REVIEW

This Court reviews the decisions of a circuit court, when the latter was itself sitting as an appellate court, under the same standard by which the circuit court is required to review the decision of the lower tribunal or administrative agency in the first instance. Martin v. Randolph

County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995), Corliss v. Jefferson County. Bd. of Zoning Appeals, 214 W. Va. 535, 591 S.E.2d 93 (2003), Webb v. W. Va. Bd. of Med., 212 W. Va. 149, 569 S.E.225 (2002) (*per curiam*).

The statute providing for this appeal first states that the circuit court "shall hear the appeal as provided in [W. Va. Code § 29A-5-4, a/k/a The State Administrative Procedures Act or SAPA]." W. Va. Code § 11-10A-19(f). The referenced SAPA provides, in pertinent part, as follows:

> (g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
>
> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedures; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
>
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. W. Va. Code § 29A-5-4.
>
> ...

In construing the language of an earlier statute governing comparable appeals ("the circuit court will determine anew all questions submitted to it on appeal from the determination of the tax commissioner," [W. Va. Code § 11-10-10(e)], this Court has expressly relied on and followed the foregoing provisions of the SAPA.

Specifically, in the leading case addressing the standard of review in appeals of this nature, this Court has held that, as a result of a long line of earlier rulings, the circuit court was

limited to a clearly erroneous and abuse of discretion standard for review of [the agency's] findings, unless the incorrect legal standard was applied." Frymier-Halloran v. Paige, 193 W. Va. 687, 458 S.E.2d 780 (1995), syl. pt. 3. (Emphasis added.)

In Frymier-Halloran, this Court also recited the general rule that questions of statutory interpretation are to be judicially reviewed on a *de novo* basis. It then observed further that the clearly erroneous standard, generally applicable to proceedings such as this, also does not protect even factual findings made on the basis of incorrect legal standards. Id. at fn. 13. Rather, this Court stated that where an appellant, such as the Appellant here, can demonstrate, as it does herein, that an administrative decision in a contested case was based on a mistaken impression of the applicable legal principle, those findings "will be accorded diminished respect on appeal." See id.

In this appeal, it is the Appellant's contention that the OTA Decision was based on a clearly erroneous interpretation and application of the statutes and regulations governing the consumer's sales and use tax treatment of sales and purchases by the Appellant, and on an abuse of OTA's discretion. See W. Va. Code §§ 11-15-9(a)(6)(C), 11-15-11 and 11-15A-3(a)(2). Thus, the Circuit Court's Final Order upholding the OTA Decision was erroneous.

Accordingly, the Appellant respectfully urges this Court to "review anew" the Circuit Court's interpretations of such laws and to accord the OTA Decision and the Circuit Court's Final Order no more than the diminished respect the precedents of this Court say they deserve.

V. STATEMENT OF FACTS[1]

The Appellant is a non-profit corporation that is exempt from federal income tax under Section 501 (c)(3) of the Internal Revenue Code. As such, the Appellant files Internal Revenue Service Form 990 annually to report, among other things, the amounts and sources of its support. As expressed in its Constitution and By-laws, the Appellant was formed and operates to engage in exclusively charitable, literary and educational activities that foster, promote, increase and develop amateur dramatics for the enjoyment and education of the general public.

Except for its operation of a concession stand at events, the Appellant's revenue-producing activities are educational, charitable, or provide recreational opportunities to the public. During the periods here in question, the Appellant did not charge, collect or remit consumers sales and service tax on the sale of tickets for admission to the performances it presented.

The concession stand the Appellant operated during its live performances was intended to raise additional funds for its operations and it charged, collected and remitted consumers sales tax on its concession stand sales. For all relevant periods, the Appellant had a current business registration certificate issued by the Appellee.

The Appellant offers membership and participation in its programs and activities to the general public by means of:

(a) announcements of upcoming events being displayed on the local shopping mall's electronic bulletin boards, on the cable access channel, and on local events websites;

[1] Although reformatted to narrative form and supplemented for clarification, the following facts were the subject of the parties' joint stipulation in the matter before OTA (sometimes hereinafter referred to as the "Joint Stipulations of Facts").

(b) painted vinyl banners advertising upcoming performances being displayed in three prominent roadway locations;

(c) posters being displayed publicly before each performance;

(d) flyers advertising of upcoming events being distributed at various hotels, on commuter trains, and in public information areas;

(e) complimentary tickets being donated to local radio stations for promotional give-aways to listeners;

(f) the publication by local, daily newspapers, *The Journal* and *The Herald-Mail* of feature stories in their weekend sections on event opening night;

(g) print advertisements placed in *The Journal* and *The Buyer's Guide*; and

(h) in its regularly updated website at www.apollo-theatre.org .

The Appellant prices its admission fees and membership dues in a manner which make its programs and activities accessible by a reasonable cross-section of the community as follows:

(a) providing in its Constitution and By-Laws that any person having an interest in theatrical presentations or in any of the purposes mentioned above, shall be eligible for membership;

(b) structuring its membership dues and admission fees so that membership dues were $15, and regular admission prices for stage productions ranged from $5 to $12;

(c) discounting the admission prices for schoolchildren at daytime performances to as little as $3;

(d) discounting all matinee tickets to enable seniors to attend more economically;

(e) providing opportunities for persons to see performances free of charge by volunteering as an usher, or simply by notifying the box office of their inability to pay;

(f) maintaining a policy of making membership, tuition, admission, and other services available at no cost to anyone with a stated financial need;

(g) providing full or partial scholarships to financially disadvantaged children to participate in its annual Youth Summer Theatre Workshop;

(h) providing complimentary tickets to individuals and groups such as patients from the local VA hospital; and

(i) providing discounted tickets to seniors through the local Senior Center and to students through their schools' English and Theatre departments.

The Appellant's gross cash support reported on its Form 990 during the periods 1999 through 2003 was in the amount of $ 747,882. That gross cash support included admission income from the sale of tickets to its various scheduled live performances in the total amount of $279,962, income from the rental of its facilities to third parties in the total amount of $49,183, income from the sale of advertisements in its printed programs in the total amount of $26,127, other, miscellaneous income that did not represent gifts, grants, charitable contributions or membership dues in the total amount of $7,778, interest income in the total amount of $26,685, all of which was from the interest earned on the remaining balance of a substantial charitable bequest it received prior to 1999 from the estate of the late Ralph Burkhart (the Burkhart bequest), gross concession stand income in the total amount of $28,775, tuition from its Youth Summer Theatre Workshop (YSTW) program in the total amount of $23,545, the sale of flowers and balloons in conjunction with its YSTW performances in the total amount of $5,138, membership dues income (exclusive of related

ticket sales) in the total amount of $3,111, gifts, bequests (other than the Burkhart bequest) and grants from State and local governments and private businesses in the total amount of $209,116, and, finally, withdrawals from the Burkhart bequest fund in the total amount of $69,149.

The Appellant's gross support in the year 2002 also included $ 3,128 from the sale of tickets, and $11,235 from corporate donations and grants both in connection with a special performance of the West Virginia Symphony.

Although it has not been the accounting policy of the Appellant to list them in its reports of sources of support on the Form 990 it files annually with the Internal Revenue Service, non-cash contributions that it receives in the form of tangible property donations each year include, but are not limited to: costume clothing and prop furniture, paint, flooring, plumbing and electrical equipment, posters, linen and rope for backdrops, office equipment and supplies, lumber and other building maintenance supplies. The total value of the non-cash donations of tangible personal property received by the Appellant during the period 1999 through 2003 can be objectively estimated to be not less than $45,000.

Likewise, although it has not been the accounting policy of the Appellant to include such non-cash contributions in its reports of the sources of its support on its Form 990, it also receives substantial donations of time by many unpaid volunteers both in connection with the live performances it presents and in connection with the various administrative duties required to carry out its tax exempt purposes. The volunteers who provided their services to enable the Appellant to present live performances include costume tailors, make-up artists, hair stylists, playbill designers, publicity agents, set designers and builders, box office agents, ushers, concession stand operators,

stage technicians (lighting and sound design , electrical wiring, curtain operation), actors and producers (the show volunteers).

Based on an hourly value of $7.00 for the time donated by the show volunteers to the Appellant during the period 1999 through 2003, the total value of that time can be objectively estimated to be not less than $ 414,963.

The services provided to the Appellant to enable it to conduct the administrative services inherently necessary to its operations include those of board members, officers and theatre clean up crews (the non-professional administrative services) and those of a certified public accountant (CPA) to maintain its financial records and another CPA to prepare tax returns (the professional administrative services). Based on an hourly value of $7.00 for the time donated by those providing non-professional administrative services to the Appellant during the period 1999 through 2003, the total value of that time can be objectively estimated to be not less than $24,535. Based on an hourly value of $25.00 for the time donated by the CPAs providing the professional administrative services to the Appellant during the period 1999 through 2003, the total value of that time can be objectively estimated to be not less than $ 63,750.

All the items and services purchased by the Appellant, on which the Use Tax Assessment was based, are used and consumed in the activities for which it qualifies for exemption from federal income taxes.

VI. POINTS AND LEGAL AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

VII. ASSIGNMENTS OF ERROR.

A. WHETHER THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN FAILING TO REVIEW THE LEGAL CONCLUSIONS IN THE ADMINISTRATIVE DECISION UNDER THE *DE NOVO* STANDARD.

B. WHETHER THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN UPHOLDING THE ADMINISTRATIVE DECISION'S LEGAL CONCLUSION THAT THE LEGISLATURE'S USE OF THE TERMS "HEALTH AND FITNESS" IN THE GOVERNING STATUTE WAS AMBIGUOUS BECAUSE IT WAS SILENT AS TO WHETHER THOSE TERMS WERE LIMITED TO *PHYSICAL* HEALTH AND FITNESS.

C. WHETHER THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN UPHOLDING THE ADMINISTRATIVE DECISION'S LEGAL CONCLUSION THAT THE RESPONDENT'S INTERPRETATIVE REGULATION, LIMITING THE MEANING OF THE TERMS "HEALTH AND FITNESS" TO ONLY *PHYSICAL* HEALTH AND FITNESS, WAS ENTITLED TO CONCLUSIVE DEFERENCE IN APPLYING THE GOVERNING STATUTE.

D. WHETHER THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN FAILING TO REVIEW, MUCH LESS OVERRULE, THE ADMINISTRATIVE DECISION'S ERRONEOUS REFUSAL TO BE BOUND BY THE PARTIES' JOINT STIPULATION THAT THE PETITIONER PROVIDED RECREATIONAL OPPORTUNITIES TO THE PUBLIC AS REQUIRED IN THE GOVERNING STATUTE.

E. WHETHER THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN UPHOLDING THE ADMINISTRATIVE DECISION'S ERRONEOUS LEGAL CONCLUSION THAT "SUPPORT" FOR PURPOSES OF THE GOVERNING STATUTE DID NOT INCLUDE THE VALUE OF DONATED SERVICES.

F. WHETHER THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN UPHOLDING THE ADMINISTRATIVE DECISION'S ERRONEOUS LEGAL CONCLUSION THAT, IN THE ABSENCE OF EXPRESS STATUTORY LANGUAGE DIRECTING THE USE OF CERTAIN, OTHERWISE UNRELATED ACCOUNTING RULES, THE RESPONDENT'S USE OF SUCH RULES TO LIMIT THE NATURE OF "SUPPORT" RECOGNIZED FOR PURPOSES OF THE GOVERNING STATUTE WAS CONCLUSIVE.

VIII. DISCUSSION OF LAW

A. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN FAILING TO REVIEW THE LEGAL CONCLUSIONS IN THE ADMINISTRATIVE DECISION UNDER THE *DE NOVO* STANDARD.

For the privilege of selling tangible personal property and dispensing services in West Virginia, Article 15, Chapter 11 of the West Virginia Code requires vendors to charge, collect and remit to the State, consumers sales and service tax on their receipts from customers for such sales and services. See W. Va. Code § 11-15-3. However, W. Va. Code § 11-15-11 provides an exemption from the charging, collection and remittance of consumers' sales and services tax for sales of otherwise taxable services by a corporation or organization that is exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, provided, that the corporation or organization meets the following criteria:

> (1) The corporation or organization is organized and operated primarily for charitable or general welfare of youth, families and the aged, improving health and fitness and providing recreational opportunities to the public;
>
> (2) The corporation or organization offers membership or participation in its programs and activities to the general public and charges fees or dues which make its programs and activities accessible by a reasonable cross-section of the community; and
>
> (3) The corporation or organization offers financial assistance on a regular and on-going basis to individuals unable to afford the organization's membership dues or fees.
>
> W. Va. Code § 11-15-11(b).

That the Appellant is a 501(c)(3) organization is not in dispute. See Joint Stip. No. 5. Furthermore, in terms of the first numbered additional criteria from the above-quoted statute, the Appellant's "Constitution and By-laws" specifically provide that the purposes for which it was formed are exclusively charitable, literary and educational activities and are to foster, promote, increase and develop amateur dramatics for the enjoyment and education of the general public. See Joint Stip. Fact No. 7. Moreover, except for the operation of a concession stand incidental to the

performances it presents, the parties stipulated that the Appellant's revenue-producing operations were either "educational, charitable or provide[d] recreational opportunities to the public." See Joint Stip. Fact No. 8. Thus, it should be clear that the Appellant clearly met the criteria set forth in W. Va. Code § 11-15-11(b)(1).

In terms of criteria number two, the parties' stipulations also provide conclusive proof that the Appellant offers membership and participation in its programs and activities to the general public and that the Appellant charges admission fees and membership dues in a manner which make its programs and activities accessible by a reasonable cross-section of the community. Thus, Appellant has satisfied the requirements of W. Va. Code § 11-15-11(b)(2). Finally, by providing discounted tickets to the young and elderly, by offering opportunities for persons to see performances free of charge, by volunteering as an usher, or simply by notifying the box office of their inability to pay, Appellant has satisfied the requirements of W. Va. Code § 11-15-11(b)(3).

Therefore, according to the stipulated facts, it should have been concluded that the Appellant qualified for an exemption from consumers' sales and services tax because it satisfied each of the criteria imposed by W. Va. Code § 11-15-11. However, without questioning the existence of those facts or their conclusive effect[2], the Circuit Court sustained the OTA Decision's contrary ruling on the basis of the purely legal conclusions that: (1) the governing statute was silent as to whether its terms "health and fitness" were limited to *physical* health and fitness; and (2) the determination in the Appellee's interpretive regulation, that the terms were so limited, was a reasonable construction of the statute that was entitled to effectively conclusive deference. In so

[2] See Discussion of Law, Subdivision D, at page 25 *infra.* regarding the Circuit Court's failure to review, much less reverse, the OTA Decision's erroneous disregard for the parties' Joint Stipulation that the Appellant provided recreational opportunities to the public as contemplated by the governing statute.

ruling, the Circuit Court failed to properly apply the *de novo* standard of judicial review applicable to such purely legal questions first addressed in the ruling of an administrative agency.

As discussed above, the Circuit Court, and this Court, review legal questions on which administrative decisions are based, under a *de novo* standard. Frymier-Halloran, *supra.*; Appalachian Power Co. v. State Tax Dep't, 195 W. Va. 573, 466 S.E. 2d 424 (1995). In cases involving judicial review of the construction given a statute by an executive agency charged with administering that statute, the first question for the reviewing court is whether the statute is clear enough to preclude the need for construction. Appalachian Power, 195 W. Va. 573, 466 S.E. 2d 424, syl. pt. 3. If the reviewing court finds that the Legislature has clearly spoken to the issue presented in the particular case, no deference is due to the agency's construction and "the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage." Id.

However, "if the statute is silent or ambiguous with respect to the specific issue, the issue for the court is whether the agency's answer is based on a permissible construction of the statute." Id., syl. pt. 4. Thus, in order to review the critical legal questions presented by the OTA Decision under the *de novo* standard, the Circuit Court was obliged to independently and objectively consider the threshold question of whether the Legislature had addressed, in a clear and unambiguous manner, whether it meant to limit the terms "health and fitness" to *physical* "health and fitness" in the governing statute. At that stage, the Circuit Court was not to give any deference to the Appellee's very interpretation that was at issue. Id. at syl. pt. 3.

Instead, in its Final Order, the Circuit Court *began* its consideration of that threshold question by giving the Appellee's interpretive regulation "'great weight.'" See Final Order, p. 5,

quoting Lincoln County Bd. of Educ. v. Adkins, 424 S.E.2d 775 (W. Va. 1992) syl. pt. 7. The Circuit Court then went on to uncritically embrace, without a shred of discussion, the assumption, inherent in the Appellee's position, that, by not expressly defining the terms "health and fitness," the Legislature "intended to delegate the interpretation of that phrase" to the Appellee. Unless this Court is prepared to hold that the Legislature never intends that the substantive words it uses are to be given their commonly accepted meanings, such an assumption by the Circuit Court is patently unwarranted.

At the very least, under the *de novo* standard of review of this legal question, the Circuit Court was obliged to consider the possibility that the Legislature's use of the terms "health and fitness" expressed its intent that all types of health and fitness were intended to be promoted by its enactment. The entirely arbitrary assumption by the Circuit Court, that the Legislature could not have intended such an obvious meaning of the simple words it used, represents an abject failure to apply the *de novo* standard of judicial review.

In its Response to Appellant's Petition for Appeal before this Court, the Appellee, arguing that the Circuit Court did conduct a *de novo* review, went even further than the Circuit Court, stating that the ambiguity lies not only with whether "health and fitness" embodies mental health but also in whether Appellant "offer[s] membership or participation in their programs or activities," or whether Appellant "has membership dues or fees." This statement contradicts the very stipulations to which Appellant and Appellee agreed. See *infra*, p. 7 (describing the ways in which Appellant offers membership and participation in its programs and activities to the general public); *infra*, pp.7-8 (discussing the methods by which Apellant prices its admission fees and membership dues).

Nevertheless, the precise issue here is that the Circuit Court did not, in fact address the threshold question of whether the statute was ambiguous. In failing to do so, the Circuit Court did not review the legal questions presented by the OTA Decision under the *de novo* standard and as such, it committed reversible error.

B. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN UPHOLDING THE ADMINISTRATIVE DECISION'S LEGAL CONCLUSION THAT THE LEGISLATURE'S USE OF THE TERMS "HEALTH AND FITNESS" IN THE GOVERNING STATUTE WAS AMBIGUOUS BECAUSE IT WAS SILENT AS TO WHETHER THOSE TERMS WERE LIMITED TO *PHYSICAL* HEALTH AND FITNESS.

In the execution and enforcement of statutes enacted by the Legislature, administrative agencies and the courts are bound to follow the express language of those laws. Appalachian Power, *supra.* Only if the meaning of those words is not apparent on their face, or if the words do not address questions that they inherently present, are administrative agencies and the courts authorized to engage in construction of that language to determine the Legislature's intent. Id.

In the statute governing the ultimate question in this case, the Legislature provided that, to claim the benefit of the exemption it provides, an organization had to, among other things, operate so as to improve "health and fitness." W. Va. Code § 11-15-11(b)(1). As might be expected, the Legislature found no need to expressly and separately define such familiar terms as "health and fitness." Although the Circuit Court took a different view in its Final Order, the mere absence of an express definition of each substantive word in a statute does not render those words ambiguous as the result of the statute's "silence." Rather, according to long-standing judicial principles, those words are to be given their ordinary and accepted meanings. Miners in Gen. Group v. Hix, 123 W. Va. 637, 17 S.E.2d 810 (1941), syl. pt. 1.

To ascertain the common and accepted meaning of "health," one only need to look to the widely accepted definition of that term found in the law's most commonly referenced dictionary. Specifically, Black's Law Dictionary defines "health" as a "[s]tate of being hale, sound or whole in *body, mind or soul*, well being." (Emphasis added). Importantly, as generally defined, the term "health" runs to one's well-being of body, mind or soul.

Likewise, as used by the World Health Organization (WHO), the common and accepted meaning of "health" includes physical and mental well being, as well as social and cultural soundness and vitality. This definition clearly states that "health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." The bibliographic citation for this definition is: Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19 June - 22 July 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948. Due, no doubt, to its well-settled and universal acceptance, the foregoing definition of "health" has not been amended since 1948 and can currently be found on the website of the WHO at http://www.who.int/suggestions/faq/en/.

In the Circuit Court's Final Order (p. 4), it was noted, without comment, that the Appellant "did not address the meaning of the term 'fitness' where the statute at issue employs the phrase 'health and fitness.'" Of course, no meaningful significance could be attributed to that omission by the Circuit Court because it is well recognized that, when used in the context of "health," "fitness" is a virtual synonym of the term "health," which unquestionably includes mental, physical and spiritual health and fitness. Webster's Medical Desk Dictionary provides that the term "health" means "the state of being sound in body or mind." *Webster's Medical Desk Dictionary* 283

(1st ed. 1986) (now in 9th printing). Further, that same edition provides the definition of "fitness" as "sound physically and mentally." *Webster's Medical Desk Dictionary* 244 (1st ed. 1986) (now in 9th printing).

Likewise, "fitness" is defined in The American Heritage Medical Dictionary as "a state of general mental and physical well-being." *The American Heritage Medical Dictionary* (2007, 2004) published by Hougton Mifflin Company. Thus, not only does the WHO recognize that the term "health" includes mental health and fitness as well as spiritual health and fitness, so does the medical community as a whole.

Therefore, absent an express indication by the Legislature that the words "health and fitness" are to be given a meaning other than their natural, ordinary and commonly accepted meaning, those definitions must be applied. Miners in Gen. Group v. Hix, *supra.*

Notwithstanding the long-standing and strong consensus among those cited sources as to the common and accepted meaning of "health and fitness," and the mandate of the foregoing judicial principles, the OTA Decision declared those terms ambiguous due to the absence of an express definition of them in the statute. That, in turn, gave OTA the opening to turn to, and ultimately defer to, the Appellee's interpretive regulation that, under the guise of interpretation, purported to insert the limiting adjective "physical" to modify "health and fitness."

In both declaring the words "health and fitness" ambiguous and embracing the Appellee's regulation interpreting them, the OTA Decision was patently erroneous under the precedents of this Court, as was the Circuit Court's Final Order in sustaining the same.

Specifically, this Court has held that:

> The practice of reading words into a statute is one to be exercised with caution, and should only be indulged when an

> omission is palpable and the omitted word clearly indicated by the context. Where the omission is not plainly indicated and the statute as written is not incongruous or unintelligible and leads to no absurd results, the court is not justified in making an interpolation. It is safer in a case which admits of doubt, when the court finds itself at all involved in conjecture as to what was the legislative intent, that the particular object which may reasonably be supposed to have influenced the legislature in the particular case should fail of consummation than that the courts should too readily yield to a supposed necessity, and exercise a power so delicate, and so easily abused, as that of adding to or taking from the words of the statute.

Lewis v. Musgrove, 80 W. Va. 714, at 717-718, 93 S.E. 820, at 821 (1917), quoting 2 Lewis' Sutherland Stat. Const., section 382, p. 736 and Johnson v. Barham, 99 Va. 305, 38 S.E. 136 (1901).

That enduring principle of judicial restraint was later recognized and applied by this Court in its oft-cited ruling in Crocket v. Andrews, 153 W. Va. 714, 172 S.E. 2d 384 (1970). There, this Court refused to allow the Charleston Police Civil Service Commission, in applying that agency's seniority rules, to interpose the terms "uninterrupted," "consecutive" or "continuous" so as to modify and limit the word "service" in the phrase "each full year of service he had with the department." In doing so, this Court carefully considered the precise words of the subject rule and found no basis in it to authorize such a deviation from the plain meaning of its words. Specifically, if found that, because the phrase as written was "language which laymen are readily able to comprehend," the administrative agency had no authority to insert limiting terms and, thus, change that plainly apparent meaning. Id.

The same is true of the terms "health and fitness" as used in the statute governing the disposition of this case. Nothing in the words of that statute preclude the understanding of laymen as to the meaning of those words. Moreover, as this Court in Crocket held:

> . . . nor is it permissible to create an obscurity or uncertainty in a statute by reading in an additional word or words. As stated in the

> early case of McClain Adm'r. v. Davis, 37 W. Va. 330, 16 S.E. 629, 18 L.R.A. 634, '[w]here the language is unambiguous, no ambiguity can be authorized by interpretation.' Plain language should be afforded its plain meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not for the purpose of creating it.

Id.

In his Response to Appellant's Petition for Appeal, Appellee also makes much of the fact that the parties' stipulations did not establish that the Appellant's programs contribute importantly to improving health and fitness. (Emphasis added). Appellant asserts that the record reflects that its programs did, indeed, contribute importantly to improving the health and fitness of the community. Certainly, the Circuit Court recognized as much in its Final Order, noting that:

> The Court would be remiss if it did not note the wonderful civic opportunities which the Apollo Civic Theatre provides to the members of the local community, including many children, our community's most important resource. The Court would further note the laudatory longstanding dedication and tremendous amount of work performed by so many volunteers, many of whom were in the courtroom for oral argument. These volunteers are our community's true heroes . . .
> Final Order, at 16, n.4. (August 7, 2007).

Thus, aside from the meaning of "health and fitness," such an attempt in the Appellee's Response, to provide another justification for the error in Circuit Court's Final Order, based on the extent of public benefit from the Appellant's programs, is conclusively refuted by that very Order.

Therefore, it remains clear that the Appellee's interpretive regulation, the OTA Decision and the Circuit Court's Final Order, all purported to find an ambiguity in the subject statute by first speculating about whether the Legislature, in using the words "health and fitness," intended to limit their meaning to *physical* "health and fitness," and, then, used that contrived ambiguity to

justify the Appellee's interpretation and the reviewing bodies' conclusive deference to the same. As such, they exceeded their authority and committed reversible legal error.

C. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN UPHOLDING THE ADMINISTRATIVE DECISION'S LEGAL CONCLUSION THAT THE RESPONDENT'S INTERPRETIVE REGULATION, LIMITING THE MEANING OF THE TERMS "HEALTH AND FITNESS" TO ONLY *PHYSICAL* HEALTH AND FITNESS, WAS ENTITLED TO CONCLUSIVE DEFERENCE IN APPLYING THE GOVERNING STATUTE.

The Appellee, while admitting that the Appellant met criteria (2) and (3) under the governing statute, argued to OTA, and the OTA Decision concurred, that the Appellant did not meet the first criteria of the statute, to-wit: that it was "organized and operated primarily for charitable or general welfare of youth, families and the aged, improving health and fitness and providing recreational opportunities to the public." That was, the OTA Decision held, because a certain provision of the Appellee's interpretive regulations purported to limit the application of the exemption statute to non-profit organizations that promote physical health and fitness.

Specifically, the Appellee's interpretive regulation asserts that the terms "health and fitness" as used in the governing statute only mean "physical health and fitness of individuals but does not include mental health and fitness or spiritual health and fitness." Title 110, West Virginia Code of State Regulations (CSR), Series 15(I)4, §3.7. (Emphasis added).

"Arbitrary and self-serving" is the only apt description of the selective inclusion of "physical" in, and the selective and express exclusion of "mental and spiritual" from, the definition of "health and fitness" adopted by the Appellee's interpretive regulation. Instead, even if construction of the words "health and fitness" was necessary in the first instance, the Appellee's interpretive regulation should have construed those unadorned statutory words by reference to all, not

just one, of the clarifying adjectives found in the long-standing, clear consensus definition of those words from the cited authorities which, in effect, establish their common and accepted meaning.

The governing statute contains no basis for such a selective limitation and, thus, the Appellee's interpretive regulation must be seen as his attempt to modify and interpret the plain and unambiguous language of the governing statute in a way that would add conditions to the statutory exemption. In doing so, the Appellee thereby abused his discretion and exceeded his authority. As this Court has held:

> Any rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same and clear unambiguous force and effect that the language commands in the statute.

CNG Transmission Corp. v. Craig, 564 S.E.2d 167, 211 W. Va. 170, syl. pt. 4 (2002) (internal citations omitted).

Therefore, any regulation purporting to interpret W. Va. Code. § 11-15-11 must either be read in harmony with it or give way to the governing statute and may not add to, subtract from or otherwise alter the statute's terms. Syncor International Corporation v. Commissioner, 208 W. Va. 658, 524 S.E.2d 479, syl. pt. 3 (2001). In fact, when a regulation is "...unduly restricted and in conflict with the legislative intent, the agency's interpretation is inapplicable." Syncor, 208 W. Va. at 662, 542 S.E.2d at 483 (quoting Boley v. Miller, 187 W. Va. 242, 246, 418 S.E.2d 352,356 (1992)).

The terms, "health and fitness," as used in the governing statute are clear and unambiguous. As such, they are to be applied and not interpreted. CNG Transmission v. Craig, *supra.* Thus, the Appellee's interpretive rule, to the extent it purports to interpret and not simply

apply those clear and unambiguous terms, is invalid, and the OTA Decision's reliance on it is clear error.

Moreover, because the rule which the Appellee promulgated, and the OTA Decision adopted, is an interpretive rule, it is inherently entitled to even less deference than legislative rules which were invalidated in the foregoing decisions of this Court. As this Court explained in yet another ruling:

> Interpretive rules . . . do not create rights but merely clarify an existing statute or regulation. Because they only clarify existing law, interpretive rules need not go through the legislative authorization process. Although they are entitled to some deference from the courts, interpretive rules do not have the force of law nor are they irrevocably binding on the agency or the court. They are entitled on judicial review only to the weight that their inherent persuasiveness commands.

Family Med. Imaging v. W. Va. Healthcare Authority, 218 W. Va. 146, 624 S.E 2d 493 (2005) (quoting Appalachian Power Co. *supra*). In defending its decision to follow the Appellee's interpretive rule, despite the foregoing holdings of this Court, the OTA Decision also invoked another point in the Court's Appalachian Power Co. holding. Specifically, the OTA Decision cites the proposition that, where a tax statute is ambiguous as a result of being silent on some essential point, the courts should defer to any reasonable interpretation the Appellee may adopt in resolving that ambiguity. Id. Of course, to apply that principle here required the OTA Decision to arbitrarily conclude that the statute's terms "health and fitness" were ambiguous due to the absence of an express definition in the statute. In so concluding, the OTA Decision's arbitrariness, capriciousness and abuse of discretion is manifest because nothing in those words or in the context of their use in the governing statute render them anything but clear in meaning.

To this end, Justice Cleckley explained, in the very case cited by the OTA decision, that when looking at the language of a statute, "[i]f the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." Appalachian Power, *supra.*, 195 W. Va. at 587, 466 S.E.2d at 438. As discussed above, the terms "health and fitness" contained in the governing statute are commonly known and accepted to mean to be a "state of being hale, sound or whole in body, mind or soul." Subdivision B.. at p. 18 *supra.*

Thus, just because those terms have a common and accepted meaning, their undefined use by the Legislature does not make them ambiguous. By uncritically adopting the Appellee's unauthorized limitation of the governing statute embodied in his interpretive regulation, the OTA Decision was based on an incorrect legal standard, and, for that reason, the Circuit Court's failure to overrule it was erroneous.

Appellee's only Response when Petitioner presented this argument in its Petition for Appeal is that a reviewing court *should* resort to agency experience for guidance. However, even accepting for a moment Appellee's argument that the statute is question is unambiguous, and that therefore Appellee's regulations were entitled to some level of deference, such deference "'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by the Legislature." Appalachian Power, 195 W. Va. at 588-589, 466 S.E.2d at 439-440 (quoting Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 464 U.S. 89, 97 (1983)). Indeed, as Justice Cleckley explained, "[j]udicial review must not become judicial abdication, and we must carefully consider each case to determine whether deference is warranted and if so, how much to accord." See id.

Instead, the Circuit Court should have found that the subject statute was plain and unambiguous, and as such, the Office of Tax Appeals was obligated to apply Syncor's three-part test under the doctrine of *stare decisis.* See Appalachian Power 195 W. Va. at 588, 466 S.E.2d at 439 ("Once this Court determines a statute's clear meaning, we will adhere to that determination under the doctrine of stare decisis . . . . An agency's later determination of the statue is not entitled to deference but will be judged against that prior judicial determination of the statute's meaning"). Likewise, "[w]hen the agency's interpretation goes beyond that scope of whatever ambiguity the statute contains, no deference is due." Id.

D. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN FAILING TO REVIEW, MUCH LESS OVERRULE, THE ADMINISTRATIVE DECISION'S ERRONEOUS REFUSAL TO BE BOUND BY THE PARTIES' JOINT STIPULATION THAT THE PETITIONER PROVIDED RECREATIONAL OPPORTUNITIES TO THE PUBLIC AS REQUIRED IN THE GOVERNING STATUTE.

Among the parties' stipulations was one that "[e]xcept for its operation of concession stand at events, the Appellant's revenue-producing activities are educational, charitable, or provide recreational opportunities to the public." See Joint Stip. Facts No. 8. (Emphasis added). Thus, it would appear that the Appellee agreed that the portion of the first statutory criteria, requiring the Appellant to provide recreational opportunities to the public, had been satisfied. However, to avoid the clear implication of the parties' stipulation on that point, the OTA Decision compounded its error (in adopting the Appellee's interpretive rule) by further interpreting the rule in a manner that required it to expressly reject the Appellee's stipulation to the contrary.

Specifically, the OTA Decision reasoned that, since the Appellee's interpretive rule limited "health and fitness" to "physical health and fitness," the following and related concept in the language of the first criteria, "recreational," had to also be limited to recreation that "necessarily

involves some physical activity (albeit with some accompanying mental stimulation)." OTA Decision, p. 12. Thus, to avoid the opposite conclusion contained in the Appellee's stipulation that the Appellant's operations did, in fact, provide recreational opportunities to the public, the OTA Decision arbitrarily and erroneously rejected that stipulation. OTA Decision, p. 4, footnote.

In concluding, on that basis, that the Appellant's operations did not meet the requirements of the first criteria, the OTA Decision erred in several ways. First, even if it were legitimate for the OTA Decision to engraft the "physical activity" standard on the recreational opportunities the Appellant had to provide the public, by concluding that the Appellant did not, the OTA Decision erroneously limited its consideration to the role of the audience at the performances the Appellant presented. Thus, by utterly ignoring the extensive on-stage physical activities pursued by the wide array of members of the public who volunteer as performers, and as backstage technical support, in the Appellant's productions, the OTA Decision even misapplied its own incorrect legal standard.

Furthermore, in CNG Transmission, the Court made clear not only that a legislative regulation is invalid if it does not adhere to the plain language of the statute that governs it, but that such legislative regulation may not be given an "interpretation" by either an administrative agency or a quasi-judicial body that, in effect, alters the plain meaning of an otherwise unambiguous statute. See CNG Transmission Corp. v. Craig, 564 S.E.2d at 172, 211 W. Va. at 175 ("In sum, '[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten.'"). Id. (quoting Syllabus Point 1, Consumer Advocate Div'n v. Public Service Comm'n, 182 W. Va. 152, 386 S.E.2d 650 (1989)).

Just as shown above with reference to the Appellee's unreasonable interpretation of the statutory terms "health and fitness," the OTA Decision's purported interpretation of the term "recreational" so as to require "physical activity," is likewise not only unauthorized, but unreasonable as well. Just as with the terms "health and fitness," the OTA Decision should have ascertained the plain and ordinary meaning of the term "recreational," which includes refreshment of both the mind and the body. Webster's defines the term as "refreshment of strength and spirits after work; *also* : a means of refreshment or diversion". http://www.m-w.com/cgi-bin/dictionary. Another similar definition provides that the term is "refreshment of one's mind or body after work through activity that amuses or stimulates; play." *The American Heritage Dictionary of the English Language*, 4th edition, published by Houghton Mifflin Company, found at http://www.answers.com/topic/recreation.

Finally, the OTA Decision further constitutes clear error in rejecting the joint stipulation agreed to by both parties, particularly where, as here, Appellant, the prejudiced party relying upon the joint stipulation, has no further opportunity to respond. See Norfolk Nat'l Bank of Commerce & Trusts v. Commissioner, 66 F.2d 48, 50 (4th Cir. 1933) ("But the [United States] Board [of Tax Appeals] on its part is bound to accept as true the facts stipulated by the parties, and if it fails to do so, and makes a finding contrary to the evidence or the necessary inferences therefrom, it commits an error of law which the court has power to correct."); United States v. Saunders, 886 F.2d 56 (4th Cir. 1989) (holding that absent exceptional circumstances, pretrial stipulations are binding upon the parties who make them); Carolina Stevedoring Co. v. Davis, 1999 U.S. App. LEXIS 22102 (4th Cir. 1999) (unpublished) (finding that the parties and the court are bound by stipulations or concessions of fact made below); Richardson v. Director, Office of Workers'

Compensation Programs, U.S. DOL, 94 F.3d 164 (4th Cir. 1996) (holding that stipulations and admissions are binding on the parties and the court on appeal as well as at trial). See also Quest Medical, Inc. v Apprill, 90 F.3d 1080, 1087 (5th Cir. 1996) ("Under federal law, stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them, unless manifest injustice would result therefrom or the evidence contrary to the stipulation was substantial.").[3]

In the case at hand, the joint stipulation that was rejected by the OTA Decision was consistent with the common and accepted definition of the term "recreational." Further, the record contains no evidence contrary to the stipulation that would justify such arbitrary rejection of it. Indeed, the Appellee who was a party to the stipulation was the same party whose interpretation of that term would purportedly be given great deference in the OTA Decision in rejecting that same conclusion. That, it is clear, compounds the manifest unfairness of having a stipulation, relied upon by both parties in presenting their respective cases, be later rejected by OTA for the first time in the OTA Decision, its final ruling.

The error of the OTA Decision on this point was compounded by the Circuit Court when it concluded that it was not necessary to even address the question due to its mootness (and harmlessness) resulting from the Circuit Court's concurrence with the OTA Decision on the earlier question about limiting the statute's use of "health and fitness" to the purely physical aspects of those terms. See Final Order, p. 9. The Circuit Court's legal error in so holding arises both from its

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[3] In is Response to Appellant's Petition for Appeal, Appellee's only response to Appellant's argument in this regard is that Appellant cites only federal cases for this proposition.

reliance on its own earlier error and from its failure to substantively address this latter error on its merits.

E. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN UPHOLDING THE ADMINISTRATIVE DECISION'S ERRONEOUS LEGAL CONCLUSION THAT "SUPPORT" FOR PURPOSES OF THE GOVERNING STATUTE DID NOT INCLUDE THE VALUE OF DONATED SERVICES.

The consumers sales and service tax statute provides, in pertinent part,

> (a) The following sales of tangible personal property and services are exempt as provided in this subsection:. . .
>
> (6) Sales of tangible personal property or services to a corporation or organization which has a current registration certificate issued under article twelve of this chapter, which is exempt from federal income tax under Section 501(c)(3) or (4) of the Internal Revenue Code of 1986, as amended, and which is:
>
> (C) A corporation or organization which annually receives more than one half of its support from any combination of gifts, grants, direct or indirect charitable contributions or membership fees;
>
> . . .
>
> (F) For purposes of this subsection:
>
> (i) The term 'support' includes, *but is not limited to:*
>
> (I) Gifts, grants, contributions or membership fees;
>
> (II) Gross receipts from fundraisers which include receipts from admissions, sales of merchandise, performance of services or furnishing of facilities in any activity that is not an unrelated trade or business within the meaning of Section 513 of the Internal Revenue Code of 1986, as amended;
>
> (III) Net income from an unrelated business activities, whether or not the activities are carried on regularly as a trade or business;
>
> (IV) Gross investment income as defined in Section 509(e) of the Internal Revenue Code of 1986, as amended;

(V) Tax revenues levied for the benefit of a corporation or organization either paid to or expended on behalf of the organization; and

(VI) The value of services or facilities (exclusive of services or facilities generally furnished to the public without charge) furnished by a governmental unit referred to in Section 170(c)(1) of the Internal Revenue Code of 1986, as amended, to an organization without charge. This term does not include any gain from the sale or other disposition of property which would be considered as gain from the sale or exchange of a capital asset or the value of an exemption from any federal, state or local tax or any similar benefit;

(ii) The term 'charitable contribution' means a contribution or gift to or for the use of a corporation or organization, described in Section 170(c)(2) of the Internal Revenue Code of 1986, as amended; and

(iii) The term "membership fee" does not include any amounts paid for tangible personal property or specific services rendered to members by the corporation or organization; . . . W. Va. Code § 11-15-9 (Emphasis added).

Upon applying the governing statutory language to the evidence in the record of this matter, it is clear that more than half of the Appellant's annual support, during the years in question, represents subsidies, grants, gifts and/or direct or indirect charitable contributions given in order to enable it to accomplish its charitable purpose.

The Appellant's gross cash support reported on its Form 990 during the periods 1999 through 2003 was in the amount of $ 747,882 (the foregoing shall be hereinafter referred to as the "Total Cash Income"). See Joint. Stip. No. 12. A spreadsheet, entitled "Analysis of Cash & Non-cash Income" (the "Spreadsheet"), reflects that and the other details of the summarized facts contained in The Joint Stipulations of Fact and was attached to the Appellant's Brief (item no. 15 in the administrative record) as Appellant's Brief Exhibit A. Of the Total Cash Income amount, $466,506 relates to income from admissions, facilities rental, program advertisements, special programs, interest income, concession stand income, tuition income, flowers income, operating

program and other income, the line-item amounts of which are set forth in Joint Stipulations 13 through 21, inclusive and shall be referred to as "Program Cash."

The Appellant's gross support during the period 1999 through 2003 included membership dues income (exclusive of related ticket sales) in the total amount of $3,111. See Joint. Stip. No. 22; Spreadsheet. The Appellant's gross support during the period 1999 through 2003 included gifts, bequests (other than the Burkhart bequest) and grants from State and local governments and private businesses in the total amount of $209,116. The Appellant's gross support during the period 1999 through 2003 included membership dues income (exclusive of related ticket sales) in the total amount of $3,111. See Joint. Stip. No. 23; Spreadsheet. In addition, the Appellant's gross support during the period 1999 through 2003 included withdrawals from the Burkhart bequest fund in the total amount of $69,149. See Joint. Stip. No. 24; Spreadsheet.

The total amount of gross support for the period 1999 through 2003 for the revenue line items set forth in stipulations 22 through 24, inclusive and designated on the Schedule as "Gifts, Grants, Contributions & Membership fees, is $281,376 and shall hereinafter be referred to as "Non-Program Cash."

The source of the Non-Program cash, being in the form of membership income, gifts and bequests, and grant income from governmental and corporate services, as well as private individuals, unquestionably qualifies as "support" for purposes of W. Va. Code § 11-15-9(a)(6)(F)(i)(I).

Although it has not been the accounting policy of the Appellant to include non-cash contributions in its reports of the sources of its support on its Form 990, the tangible property donations that it also receives, each year, the value of which is estimated to be no less than $45,000

for the period 1999 through 2003, likewise constitute a contribution in accordance with W. Va. Code § 11-15-9(a)(6)(F)(i)(I). See Joint. Stip. No. 26; Spreadsheet. (The foregoing shall be hereinafter known as the "Property Donations.")

Likewise, the services donated by individuals to (a) enable to Appellant to present live performances, valued at not less than $ 414,963, (b) provide non-professional administrative services, valued at not less than $24,535, and (c) provide professional administrative services, valued at not less than $63,750, constitutes a contribution within the meaning of § 11-15-9(a)(6)(F)(i)(I). See Joint. Stip. Nos. 29-31 (the total of the foregoing is $503,248 and shall be hereinafter referred to as the "Donated Services"). See Spreadsheet (Volunteers' Time).

Upon applying the governing statutory language to the evidence in the record of this matter, it is clear that more than half of the Appellant's annual support, during the years in question, represents subsidies, grants, gifts and/or direct or indirect charitable contributions given in order to enable it to accomplish its charitable purpose. Specifically, during the years in question, the Appellant's total annual financial support ranged between $ 218,169 (representing Program Cash of $84,171, Non-program Cash of $25,856, Donated Services of $104,102 and Donated Property of $4,040) in 1999 and $289,075 (representing Program Cash of $109,465, Non-program Cash of $55,845, Donated Services of $109,700 and Donated Property of $14,065) in 2003, (See Spreadsheet).

During those same years, the Appellant's support in the form of subsidies, grants, gifts and direct and indirect charitable contributions ranged between $ 133,998 (representing Non-program Cash of $25,856, Donated Services of $104,102 and Donated Property of $4,040) in 1999

and $176,610 (representing Non-program Cash of $55,845, Donated Services of $109,700 and Donated Property of $14,065) in 2003. See Spreadsheet.

During each of those same years, the percent of the former that the latter represented ranged from 61.4% (1999) to 61.1% (2003), and in each of those years the percent of the former that the latter represents exceeded fifty percent of the total support received.

As a result of the fact that, during the years in question, the Appellant received more than half of its support from a combination of subsidies, grants, gifts and direct and indirect charitable contributions for the purpose of accomplishing its charitable objectives, it was exempt from consumers sales and service tax on its purchases. W. Va. Code § 11-15-9(a)(6)(C). Thus, because exemptions that apply to the consumers sales and service tax also apply to the purchaser's use tax, the Appellant's purchases were exempt from use tax for those same reasons. W. Va. Code § 11-15A-3(a)(2).

In rejecting that conclusion, the OTA Decision asserted that the value of volunteered services and donated property cannot be included in the statutory measure, and thus, the Appellant did not receive more than half of its support from authorized sources. To reach that conclusion, the OTA Decision first laments, but does nothing to overcome, the fact that the quoted list of sources of "support," that can be counted to satisfy the statutory measure, is introduced by the phrase "includes, but is not limited to." OTA Decision, p. 15. An examination of well-settled authority reveals the significance attached to such a phrase as a part of the body of law of statutory construction.

Specifically, this Court has held that the Legislature's use of the term "including," when introducing a list of described items, reflects a clear intent that the list is illustrative of other items having similar characteristics as to which the subject rule, condition, etc. is also intended to be

applicable. State Human Rights Commission v. Pauley, 158 W. Va. 495, 212 S.E.2d 77 (1975). The certainty of such an intent is all the greater when "including" is followed by "but not limited to." Id.

Thus, in the case at hand, by using the terms "includes, but is not limited to" in W. Va. Code § 11-15-9(a)(6)(F)(i), the Legislature clearly intended that the list of items that followed be viewed as one that is non-exclusive in nature and thus sets forth only examples of the types of items that could constitute support rather than an exhaustive list thereof.

In reaching its conclusion that the governing statute does not permit the inclusion of the value of donated services and of the use of property in determining the amount of support a charitable organization has received for its purposes, the OTA Decision, as well as the Appellee, also misreads the references to Section 170 of the Internal Revenue Code. Specifically, the governing statute provides, in part, that:

> (i) The term 'support' includes, *but is not limited to:*
>
> ...
>
> (VI) The value of services or facilities (exclusive of services or facilities generally furnished to the public without charge) furnished by a governmental unit referred to in Section 170(c)(1) of the Internal Revenue Code of 1986, as amended, to an organization without charge. ...
>
> (ii) The term 'charitable contribution' means a contribution or gift to or for the use of a corporation or organization, described in Section 170(c)(2) of the Internal Revenue Code of 1986, as amended; and ...
>
> W. Va. Code § 11-15-9(a)(6)(F). (Emphasis added).

A careful reading of subdivision (F)(i)(VI) quoted above, in the context in which it is being used, clearly reveals that "the value of services or facilities (exclusive of services or facilities generally furnished to the public without charge) furnished *by* a governmental unit referred to in Section 170(c)(1) of the Internal Revenue Code," is a non-exclusive example of the kinds of support

recognized for purposes of satisfying the fifty percent support test contained in the governing statute. It is not, as the OTA Decision contends, inapplicable to the disposition of this matter, presumably because the type of donor to which it refers was not among the Appellant's supporters under the facts of this case.

Rather, subdivision (F)(i)(VI) simply provides that, for purposes of the statute governing this particular exemption from sales and use tax, the value of gratuitously furnished services or facilities are among the kinds of support that will be recognized, and that a governmental unit referred to in the cited provision of the Internal Revenue Code is among the sources of such support that will be recognized. This is the better reading of the subject provision because, as demonstrated above, the entire list of examples of "support" of which it is a part is introduced by the terms of enlargement "including, but not limited to." State Human Rights Commission, supra.

The OTA Decision would also distort the clear meaning of subdivision (F)(ii) cited above from the governing statute. Specifically, with reference to the federal income tax provision cited there, the OTA Decision erroneously concludes that "a review of [Section 170(c)(2) of the Internal Revenue Code of 1986, as amended] reveals that such contributions are to be in the form of monetary gifts and property donations, not in the form of services ..." OTA Decision, p. 16. Rather, only the most imprecise reading of that specific federal income tax code provision, again, in the context of the statute governing the sales and use tax exemption here, would permit such a conclusion.

A more careful consideration of the substance and structure of the language of subject item (i), and a proper respect for the precision with which the Legislature expressed its clear intent by using that language, reveals that its manifest purpose was to identify the kind of organization to

which contributions deemed "charitable" could be given -- for purposes of the sales and use tax exemption to which it was addressed. That is so because the precise numbered paragraph (2) of subsection (c) of Section 170 of the Internal Revenue Code, to which the Legislature referred, contains only a list of some, but not all, of the kinds of private organizations that are eligible to receive federal income tax deductible contributions.

That subdivision says nothing about the form of such contributions, which is dealt with in other portions of Section 170. If the Legislature had intended to incorporate the rules addressing the form of such contributions, as the OTA Decision asserts, it would have simply made reference to the entire Section and would not have limited its reference to that particular subdivision of one subsection of the Section that only served to describe some, but not all, of the types of private organizations eligible to receive income tax-deductible contributions.

Thus, notwithstanding the OTA Decision's construction, limiting the sources and forms of support that will satisfy the statutory measure, the reference, in the statute, to "the value of services or facilities (exclusive of services or facilities generally furnished to the public without charge)," clearly supports the inclusion of such values, gratuitously furnished from any source to the Appellant, for that purpose. See W. Va. Code §§ 11-15-9(a)(6)(F)(i)(VI) and 11-15-9(a)(6)(F)(ii).

Accordingly, the OTA Decision was in error in deleting such values from the consideration of whether the Appellant satisfied the statutory measure for support. However, upon its review of the OTA Decision's treatment of this question, the Circuit Court completely disregarded the Appellant's citation of the rulings of this Court involving the application of such socio-economic legislation. Specifically, this Court has held that, where the operative statute is in the nature of "socioeconomic legislation, it is to be liberally construed in favor of the taxpayer" to

achieve the beneficial and remedial purposes it is intended to promote. See Andy Bros. Tire Co. v. W. Va. State Tax Commissioner, 160 W. Va. 144, 233 S.E. 2d 134 (1977); Brockway Glass Co. v. Caryl, 183 W. Va. 122, 394 S.E. 2d 515 (1990).

Here, it is apparent that the subject exemption was enacted for the socio-economic reason that the Legislature intended to avoid imposing the burden of sales and use taxation on the purchases of typically cash-strapped charitable organizations such as the Appellant, and, thus, to encourage and support their good works. Although the socio-economic legislation in Andy Bros. and Brockway Glass involved investment incentive tax credit programs, the reasoning of those cases is not limited to only such programs but, rather, extends to any type of legislation that provides tax relief for socioeconomic purposes.

Here, by use of the inclusive phrase "includes, but is not limited to," in identifying the sources of support that would be counted in determining an organization's eligibility for the exemption, the Legislature virtually invited a liberal interpretation of the term "support." Thus, in light of the express language and obvious purpose of the exemption, it also clearly qualifies as socioeconomic legislation and as such, any ambiguities about its application should also be construed in favor of the Appellant.

However, instead of even appearing to recognize, much less consider, those judicial principles of construction, the Circuit Court simply returned to its entirely deferential posture with reference to the Appellee's construction as not being shown to be "clearly wrong" and, thus, being conclusive. To do so, in the face of the compelling precedents of this Court to the contrary, was legal error.

F. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN UPHOLDING THE ADMINISTRATIVE DECISION'S ERRONEOUS LEGAL CONCLUSION THAT, IN THE ABSENCE OF EXPRESS STATUTORY LANGUAGE DIRECTING THE USE OF CERTAIN, OTHERWISE UNRELATED ACCOUNTING RULES, THE RESPONDENT'S USE OF SUCH RULES TO LIMIT THE NATURE OF "SUPPORT" RECOGNIZED FOR PURPOSES OF THE GOVERNING STATUTE WAS CONCLUSIVE.

In concluding that the Appellant is not entitled to an exemption under W. Va. Code § 11-15-9(a)(6)(C), the OTA Decision relies, in part, upon Statement of Financial Accountant Standard No. 116, Accounting for Contributions Received and Contributions Made. Specifically, the OTA Decision agrees with the Appellee's contention that, since the Burkhart Estate bequest was received prior to the years here in question, the interest income from it that the Appellant received during the period in question, does not qualify as support in the form of a gift, grant or charitable contribution for purposes of the subject exemption.

However, the governing sales tax law neither references nor authorizes reliance upon such Statements of Financial Accounting Standards, promulgated by the Financial Accounting Standards Board ("FASB"). Nor can such use be implied. In fact, while the Legislature expressly incorporated Generally Accepted Accounting Principles by reference into the business franchise tax and corporation net income tax articles [W. Va. Code §§ 11-23-1 et seq. and 11-24-1 et seq.], it omitted any reference to GAAP or FASB rules in the consumers sales and service tax or use tax laws [W. Va. Code §§ 11-15-1 et seq., 11-15A-1 et seq. and 11-15B-1 et seq.].

Likewise, in its only decision construing W. Va. Code § 11-15-9(a)(6)(C), the West Virginia Supreme Court held that the term "grant" as used there simply means giving something to accomplish a charitable purposes. Kings Daughters Housing, Inc. v. Paige, 203 W. Va. 74, 506 S.E. 2d 329 (1998) *per curiam*. In doing so, the Supreme Court did not refer to, much less rely upon, standards issued by FASB. Rather, the Court employed the common and accepted meaning of the

term for use in the governing statute. Thus, the OTA Decision's attempt to engraft on that statute such financial accounting standards in place of that common and accepted meaning shows that it relied on an incorrect legal standard.

Since holding the funds of the Burkhart Estate bequest in interest-bearing accounts, pending their expenditure for charitable purposes, was the inherent fiduciary duty of the Appellant, the obvious implication is that such interest was, along with the principal, something given "to accomplish a charitable purpose." Thus, the OTA Decision to the contrary was erroneous.

Nevertheless, upon its review of this question of statutory interpretation, the Circuit Court declined to apply the precedents of this Court cited above, and, instead, simply concluded, for final time, that the Appellee's position should be sustained because the Appellant had not shown that it was "neither clearly wrong, arbitrary, capricious, nor manifestly contrary to the governing statute." In order to do so, the Circuit Court chose to treat this purely legal question of statutory interpretation as a purely factual question to which it owed essentially conclusive deference to the OTA Decision's findings. As such, the Circuit Court, itself, applied an incorrect legal standard, and committed reversible legal error.

IX. PRAYER FOR RELIEF

Based on the evidence in the record of this matter, the foregoing points and authorities, and the relevant statutory and case law in support thereof, it is respectfully submitted that this Appeal should be granted and that the Circuit Court's Order, denying Appellant's Petition for Appeal, should be reversed and overruled to set aside the Administrative Decision.

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CERTIFICATE OF SERVICE

I, Michael E. Caryl, Esquire, do hereby certify that a true and exact copy of the foregoing Appellant's Brief has been served, by United States Postal Service, postage prepaid, upon the following:

Katherine A. Schultz, Esquire
Senior Assistant Attorney General
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this 21st day of April, 2008.

Michael E. Caryl